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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/457,709	12/10/1999	RICHARD J. MELKER	U5583.0000/P	7980
7590	12/06/2004		EXAMINER	
David R. Saliwanchik Saliwanchik, Lloyd & Saliwanchik, P.A. 2421 N.W. 41st Street, Suite A-1 Gainesville, FL 32606-6669				LEWIS, AARON J
		ART UNIT	PAPER NUMBER	3743

DATE MAILED: 12/06/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	09/457,709	MELKER ET AL.
	Examiner AARON J. LEWIS	Art Unit 3743

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).

Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 11/19/2003 (AMENDMENT).

2a) This action is FINAL.      2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 37-85 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 37-85 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All    b) Some \* c) None of:

1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) Notice of References Cited (PTO-892)  
2) Notice of Draftsperson's Patent Drawing Review (PTO-948)  
3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.

4) Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.

5) Notice of Informal Patent Application (PTO-152)

6) Other: \_\_\_\_\_.

**DETAILED ACTION**

***Claim Rejections - 35 USC § 103***

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

2. Claims 37-85 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kanesaka (US 5042470) in view of Heinonen (US 5649531) & Haluszka et al, "Whole Body Plethysmography".

In regards to claims 37-85 Kanesaka substantially discloses the instant application's claimed invention to include the provision of a ventilator system (1/5) that contains a control device (Col. 4 lines 15-32, note the teaching of inputting of patient data into device that will facilitate ventilation, i.e. to control the device, therefore one of ordinary skill in the art would reasonably conclude that the device has a means for controlling its operation), with a means for inputting a data (note col. 4 lines 17-20) that provides ventilation to a patient and that may calculate ventilatory parameters utilizing such data which includes data that represents height, (i.e. put in a mixture of variables such as patient surface area based upon height & weight), but the teaching is unclear if the calculations are done in the control unit or by the operator and Kanesaka does not explicitly disclose use of height data alone to calculate a ventilatory parameter. However, Heinonen discloses an in situ control device rendering the respiratory ventilation control values (col. 8 lines 19-40) based upon data inputs. The references are analogous since they are from the same field of endeavor, the respiratory arts. At

the time the instant application's invention was made, it would have been obvious to one of ordinary skill in the art to have taken the features of Heinonen and used them with the device of Kanesaka. The suggestion/motivation for doing so would have been to relieve the operator of the burden of rendering the calculations and also minimizing the potential for human error by having the control device execute the calculations instead of the operator. Therefore it would have been obvious to combine the references to obtain the instant application's claimed invention. Furthermore, such a feature is old and well known in the art, and one of skill in the art would consider such to amount to a matter of mere obvious and routine choice of design, rather than to constitute a patently distinct inventive step, barring a convincing showing of evidence to the contrary.

The suggested device substantially discloses the instant application's claimed invention, but does not explicitly disclose solely using only patient height as the raw data to derive a ventilatory parameter. However, Haluszka disclose such (See the 5th paragraph on the first page of the English language abstract that starts with "It was stated") The references are analogous since they are from the same field of endeavor, the respiratory arts. At the time the instant application's invention was made, it would have been obvious to one of ordinary skill in the art to have taken the features of Haluszka and used them with the suggested device. The suggestion/motivation for doing so would have been to because patient body length alone can function as a sufficient ventilatory parameter/limitation predictor and all other raw data patient inputs improve correlation very little or are without practice influence (See paragraph 5 of the English language abstract of Haluszka). Therefore it would have been obvious to combine the references to obtain the instant application's claimed invention. Furthermore, such a feature is old and well known in the art, and one of skill in the art

would consider such to amount to a matter of mere obvious and routine choice of design, rather than to constitute a patently distinct inventive step, barring a convincing showing of evidence to the contrary.

Claims 38-47 define a plurality of ventilation parameters which are disclosed by Kanesaka (note col. 4 lines 15-32) as modified by Heinonen and/or Haluszka (note the tables and materials/methods sections) and/or such parameters would be mere obvious variables that one of ordinary skill in the art would appreciate as necessary to carry out any ventilatory methodology.

The balance of the claims 48-85 appear to be substantially equivalent in scope to claims 37-47 and are therefore rejected by the suggested device of Kanesaka, Heinonen & Haluszka as noted above which is herein incorporated by reference. With respect to the alarms of claim 66 and those claims that set forth the calculation/determination of a "ventilatory limit" note Kanesaka (Col. 4, line 5 et seq) which teaches a plurality of alarms which are responsive to the manually set ventilation parameters disclosed at col. 4, lines 16 et seq; these same parameters of the suggested device of Kanesaka, Heinonen & Haluszka are readable upon applicant's set forth "ventilatory limits" as one of ordinary skill in the art would appreciate such limits to be merely the points of the derived values wherein safe/proper ventilation would not be affected and as such the operator/user should be notified and the control should respond/adjust ventilation.

***Response to Arguments***

1. Applicant's arguments, see page 3, filed 19 Nov 03, with respect to the rejection(s) of all claims under 35 USC 103 have been fully considered and are persuasive, and render all subsequent arguments moot. Therefore, the rejection has been modified to clearly set forth the examiner's position on what the prior art does &

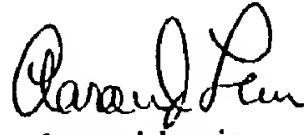
does not set forth and how the mesh under 35 USC 103 in light of the current level of one of ordinary skill in the art and the current claim language. Accordingly, the rejection is made non-final so that applicant has full benefit of an accurate and consistent analysis of the prior art that is a proper reasoned basis IAW 5 USC 555 for informal adjudication and the relevant substantive patent law. Accordingly for this reason, and for only this reason and for no other reason is this action being made non-final.

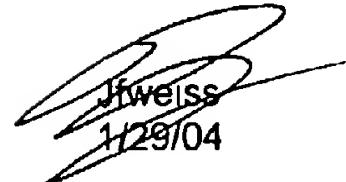
**Conclusion**

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Joseph F Weiss Jr. whose telephone number is 703-305-0323. The examiner can normally be reached on M-F, 8-4.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Henry A. Bennett can be reached on 703-308-0101. The fax phone number for the organization where this application or proceeding is assigned is 703-305-3590.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0858.

  
Aaron J. Lewis  
Primary Examiner

  
JF Weiss  
1129/04